#39.30 3/28/73

Memorandum 73-35

Subject: Study 39.30 - Wage Garnishment and Related Matters

At the last meeting, the Commission asked Professor Warren to prepare an analysis of the position of the California employer if the Commission's wage garnishment statute were enacted and no federal exemption obtained. As the tables contained in the Commission's report indicate, the state statute provides significantly greater protection to the debtor than the federal law. Nevertheless, there is the remote possibility that some case might exist where more is deducted under the state law than the federal law. Such a possibility might exist where a public retirement system deducts at an exceedingly high rate on a highly paid employee.

Professor Warren's memorandum is attached as Exhibit I. He concludes that the benefits to the employer of the recommended statute are so great as to outweigh the rather speculative risks to the employers involved in withholding on the basis of the California statute only.

Attached is a copy of the pamphlet containing the Commission's recommendation. Please bring this pamphlet to the meeting.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 73-35

EXHIBIT I

March 26, 1973

To: John H. DeMoully

From: W.D. Warren

Re: Employer's Liability under Title III of CCPA

This brief memorandum is in response to the issue whether the employer is in a dangerous position when attempting to comply with overlapping state and federal garnishment limitation laws which may conflict in some instances. My belief is that the potential for danger to employer under this system is not great and is greatly outweighed by the other benefits which the Employee Earnings Protection Law affords employers. However, a note of caution is in order in that the federal cases on Title III are thus far only district court cases and there is a dearth of state authority on the question of the employer's liability to the employee. Hence, this memorandum must be taken for no more than what it is, i.e., an informed guess about what courts are likely to do with the dual enforcement problem in the future.

A. Employee's Rights Against Employer under Federal Law.

The question raised is the position of an employer who complies with California garnishment restriction law (EEPL) but violates Title III of the Consumer Credit Protection Act, presumably by withholding too much from the employee's

wages. That Act provides in 14 U.S.C. § 1676 that the Secretary of Labor shall enforce the provisions of the Act. The only other enforcement provision in Title III is 15 U.S.C. § 1674(b) which provides for criminal penalties for violation of the provisions on discharge from employment.

The question has been raised whether a private civil remedy might be implied in the absence of an express grant of a civil remedy. Thus far all indications are that an aggrieved employee will have no rights under Title III to sue the employer, creditor, sheriff, et al. Oldham v. Oldham, 337 F.Supp. 1039 (N.D. Iowa 1972), denied an employee a civil action. The court pointed out that portions of the CCPA, namely Truth in Lending and Credit Reporting, provide for private civil actions for compliance; the absence of any mention of a civil remedy in Title III must mean that Congress intended no such action. The court relied on Jordan v. Montgomery Ward & Co., 442 F.2d 78 (8th Cir. 1971), in which the court refused to imply a civil action for violation of the advertising provisions of Truth in Lending on the ground that these provisions were contained in a separate chapter of the law which made no provision for a civil remedy.

In Higgins v. Wilkerson, 63 Labor Cases ¶ 32,379 (D. Kan. 1970), plaintiff filed a class action on behalf of herself and all wage earners in Kansas for the purpose of obtaining declaratory and injunctive relief from garnishment

laws of Kansas which she alleged were inconsistent with Title III. The court denied this relief on the ground that: "No private civil remedy, as such, has been provided by Congress. It would thus appear that the Secretary of Labor is the proper person to seek injunctive or other relief against any violation of the garnishment standards provided by the Consumer Protection Act." 63 Labor Cases at p. 44,369.

Similarly the employee has been denied a civil remedy to enforce his rights under the discharge provisions of 15 U.S.C. § 1674. Simpson v. Sperry Rand Corp., 350 Supp. 1057 (W.D. La. 1972). There the court held that although a federal statute passed to protect a class of citizens might be the basis for implying a civil right in members of the class, this would not be true when there are "contrary implications" in the Act. The contrary implications here were: that the Secretary of Labor was specifically given the authority to enforce the Act; and that other portions of the CCPA provide for civil remedies while Title III does not.

Thus for the only enforcement proceedings under Title III that have found their way into the reports are injunction suits by the Secretary of Labor against state or local courts. See, e.g., Hodgson v. Cleveland Municipal Court, 326 F.Supp. 419 (N.D. Ohio 1971), and Hodgson v. Hamilton Municipal Court, F.Supp. (S.D. Ohio 1972). Of course, the creditor can sue the employer for the amount to

which it is entitled under state law so long as the creditor's claim is within the strictures of Title III. Sterling Finance Co. v. Thornhill, 25 Ohio Misc. 213, 263 N.E.2d 925 (1970).

One has to conclude that Title III fails to give a civil remedy to an employee for redress against an employer who has violated the Act. In fact, there is no express indication that the Act even gives the Secretary of Labor rights against employers. The only duty of compliance expressly imposed by Title III is found in 15 U.S.C. § 1673: "No court of the United States or any State may make, execute, or enforce any order or process in violation of this section." So far the Secretary has proceeded only against court officials.

It is conceivable that an aggrieved employee might invoke the jurisdiction of the federal courts under 42 U.S.C. § 1983 which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

This, of course, is oriented toward protecting citizens by allowing the federal courts to prevent the states from depriving

them of their civil rights. In Lynch V. Household Finance Corp., U.S. , 92 Sup. Ct. 1113, L.Ed. (1972), the court refused to dismiss a suit to enjoin creditors and courts from garnishing plaintiff's property under state statutes which plaintiff contended violated the Equal Protection and Due Process Clauses. The Court held that the Civil Rights Act extended protection to property as well as personal rights. It is probably too early to predict whether aggrieved employees will be able to make any effective use of this civil rights legislation in something so pedestrian as a technical violation of a federal statute like Title III.

B. Employee's Rights Against Employer under State Law.

Presumably the employee's tort remedy would be abuse of process on the theory that exempt property has been seized by a creditor acting through judicial process. It does not appear that the employee would have any rights under the abuse of process theory against the employer. These rights would normally run against the party instituting the proceeding, i.e., the creditor. I have found no authority allowing the employee to hold the employer in abuse of process for withholding too much from the employee's wages in accordance with legal process. In fact, it is questionable whether the employee would have a cause of action in abuse of process against the creditor when the creditor was proceeding in

accordance with state law with no "ulterior purpose" and no malice. Possibly the employer could be held as a converter, but as one acting under judicial process he should be liable for no more than the amount of money withheld.

The definitive treatment of torts involving use of legal process was written by Professor Riesenfeld and is found in Chapter 5, Debt Collection Tort Practice (C.E.B. 1971). I hope that his views on these matters can be elicited to check the correctness of my assumptions in the previous paragraph.

In a cursory search of the authorities I have found no authority on the possibility of contractual recovery to which the aggrieved employee may be entitled against the employer who has withheld an excessive amount. The employer is by our hypothesis one who has in good faith, pursuant to legal process, withheld earnings to pay a valid debt of the employee. Allowing the employee recovery against the employer raises a circularity problem: If the employee can recover against the employer, does not the employer have rights over against the creditor? But if the creditor must reimburse the employer for what it paid out to the employee, should not the creditor be able to reclaim this amount from the employee as part of an unpaid debt?

The threat of contractual recovery by employee from employer does not appear to be a substantial risk to the

employer. Presumably the differences in amounts ordered to be withheld under state law and those properly withheld under federal law would not be great. Settlement of claims with individual employees should not be difficult for employers. Even class action recovery should not pose a substantial threat when the problem is viewed in perspective for these reasons: (1) There are relatively few instances in the true employer-employee case in which the proposed California statute and Title III will give different results. (2) The sums of money involved even for a substantial class should still be so small as to be relatively unattractive to the class action lawyer. (3) The employer having to pay employees the amounts due them under the federal law would presumably have rights over against the creditor for all amounts paid.

C. Conclusion

A regime of overlapping federal-state enforcement of wage garnishment is probably not as impractical or unattractive as it may seem at first. Certainly the personnel of both state and federal agencies involved is not excessive. It is very likely that if state authorities do a good job in enforcing the California law with respect to the employer-employee cases covered by the EEPL, the federal personnel will concentrate on other areas. But even if federal authorities do intervene in areas covered by the EEPL they will probably do

so only by injunctive relief aimed at court officials. This poses no threat to employers. The only risk such a dual system of enforcement imposes upon employers is that of private suit by employees, and this risk seems relatively slight when the realities of the situation are grasped. Abuse of process would not seem to lie against the employer, and even if conversion would lie the damages would not include punitive or exemplary damages. Contract liability against the employer is possible but hardly an appealing lawsuit from the standpoint of the employee's lawyer.

Very few states have obtained exemption from federal enforcement thus far. It appears that a dual system of wage garnishment limitation is likely to be the rule in this country in the future. This pattern has been true in the truth-in-lending area as well. Certainly we cannot guarantee that a dual system of law in this area will not raise an occasional problem for employers, but it should be kept in mind that the benefits to the employer of the EEPL are so great as to outweigh the rather speculative risks to the employers involved in such a dual system.